

SERVED DECEMBER 4, 2006

**U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, DC**

IN THE MATTER OF

JOAQUIN RODRIGUEZ

**FAA DOCKET NO. CP05SO0049
(Civil Penalty Action)**

DMS NO. FAA-2005-22885 -13

**ADMINISTRATIVE LAW JUDGE'S ORDER
CLOSING THE RECORD**

On October 27, 2006, I issued an order continuing the hearing in this case and requiring certain showings by the Respondent. Both parties have filed papers in response to that order. The Complainant has filed a motion (i) seeking to have the continued hearing begin at 2:00 p.m. rather than the 10:00 a.m. starting time set forth in my October 26 order; (ii) allowing it to present the testimony of rebuttal witnesses by telephone; (iii) noting, for the record, its objection to the belated appearance entered by counsel for the Respondent; and (iv) requiring the Respondent to respond to pending discovery requests. The Respondent has filed two declarations, i.e., affidavits. One was executed by him, to which has attached copies of income tax returns and other material purporting to support his contention that payment of the civil penalty sought by the Complainant is beyond his means. The other declaration is by his attorney. Among other things, it states that "my client does not intend to present witnesses to testify in this proceeding."

The purpose of continuing the hearing was to permit the Respondent to submit evidence for the record bearing on the issue of the amount of the civil penalty that should be assessed against him. This authorization constituted extraordinary relief, so far as the parties were concerned.

Normally, all parties are obligated to present their evidence, by the testimony of witnesses and documents sponsored by the witnesses, on the date and at the time set for the hearing. But the Respondent did not appear at the hearing held on October 24, 2006. Instead, his counsel sought a continuance to allow him to take the witness stand and testify on his own behalf. Over the vociferous objection of the Complainant (who proffered the testimony of its witness), I granted that request. Now we learn that the Respondent does not intend to submit admissible evidence in support of his position. Instead, he wants to have the issue of his ability to pay decided solely on the basis of written statements.

The written statements are out-of-court declarations submitted in order to establish the truth of their contents. In other words, the declarations that the Respondent has proffered are hearsay. True, they are sworn statements; but sworn hearsay is nonetheless hearsay. It is true that I have discretion to receive evidence that is technically hearsay. Section 13.322(c) of the Rules of Practice provides that “hearsay evidence [sic] is admissible” in FAA civil penalty cases. It goes on to provide that the fact that the evidence is hearsay “goes only to the weight of the evidence and does not affect its admissibility.” 14 C.F.R. § 13.322(c). This directive is, however, subject to the overriding mandate of the Administrative Procedure Act, which provides that a party to an administrative adjudication “is entitled . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5 U.S.C. § 556(d).

The right to cross-examine is, however, a privilege that can be waived. Hence, in an order issued November 17, 2006, I asked the Complainant to advise whether it would object to the receipt in evidence of any of the materials proffered by the Respondent. Responding to that order, the Complainant has said that it does not object to receiving for the record any of the materials proffered by the Respondent, with the exception of the purported tax returns he submitted and his attorney’s declaration.¹ The Complainant’s objections are well-taken. The declaration is not an evidentiary document; it appears to have been submitted solely for the purpose of stating the Respondent’s position on the merits. In any event, an attorney representing a party in an action is disqualified from testifying on the merits in that action. Under the Administrative Procedure Act,

¹ The Complainant does, however, assert that certain of the materials are irrelevant. This argument appears to relate to the weight to be accorded the documents, not their admissibility.

moreover, the Complainant has the right to cross-examine the Respondent on the contents of the documents that purport to be his tax returns, including the issue of whether the unsigned tax forms he has submitted are genuine. In light of the Respondent's statement that he does not intend to proffer a witness to testify about the contents of the tax return forms, those forms are inadmissible and are rejected. Also rejected as evidence is the contents of the declaration of Respondent's attorney.


The following documents are received in evidence, without objection, as late-filed exhibits:

<u>Exhibit No.</u>	<u>Description</u>
R-1	Affirmation of Joaquin Rodriguez
R-2	Social Security Statements
R-3	DD Form 214
R-4	Certificate of Award of Conspicuous Service Cross
R-5	Certificate of Recognition for Cold War Service

In view of the contents of this order, the Complainant's motion for a continuance of the hearing date and to modify certain other aspects of my October 26, 2006 order is deemed to be moot and will not be further acted upon.

The record is now closed. There will be no further hearing sessions. An initial decision will be issued based upon the evidentiary record as it now stands.

IT IS SO ORDERED.


Isaac D. Benkin
Administrative Law Judge

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Hearing Docket
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